No. 93-377

(6)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

BEST AVAILABLE COPY

JOINT APPENDIX

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Petition for Certiorari Filed September 7, 1993
Certiorari Granted November 1, 1993

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CHRONOLOGICAL LISTING OF IMPORTANT DATES

Dec. 30, 1988	Summons (Index No. 7-89 Supreme Court, Albany County
Dec. 30, 1988	Verified Complaint (Index No. 7-89) Supreme Court, Albany County
Dec. 30, 1988	Order to Show Cause (Index No. 7-89) Supreme Court, Albany County
Dec. 30, 1988	Affidavit of Rosemary Saffire in support of plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
Dec. 30, 1988	Summons (Index No. 8-89) Supreme Court, Albany County
Dec. 30, 1988	Verified Complaint (Index No. 8-89) Supreme Court, Albany County
Dec. 30, 1988	Order to Show Cause (Index No. 8-89) Supreme Court, Albany County
Dec. 30, 1988	Affidavit of Elias H. Attea, Jr. in support of plaintiff's motion for a preliminary injunction (Index No. 8-89) Supreme Court, Albany County

Jan. 9, 1989	Affidavit of Richard J. Freshour in opposition to plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
Jan. 9, 1989	Affidavit of Frank Munoz in opposition to plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
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Jan. 9, 1989	Affidavit of Richard J. Freshour in opposition to plaintiff's motion for a preliminary injunction (Index No. 8-89) Supreme Court, Albany County
Jan. 9, 1989	Affidavit of Frank Munoz in opposition to plaintiff's motion for a preliminary injunction (Index No. 8-89)
Jan. 9, 1989	Affidavit of William F. Collins in opposition to plaintiff's motion for a preliminary injunction (Index No. 8-89)
Jan. 14, 1989	Affidavit of Joseph E. Zdarsky in support of plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County

Jan. 14, 1989	Affidavit of Joseph Anderson in support of plaintiff's motion for a preliminary injunction (Index No. 7-89) Supreme Court, Albany County
Jan. 17, 1989	Oral argument on motions for preliminary injunction (Index Nos. 7-89; 8-89) Supreme Court, Albany County
Jan. 18, 1989	Decision of Supreme Court, Albany County (Cheeseman, J) granting plaintiffs' motions for preliminary injunction (Index Nos. 7-89; 8-89)
Jan. 19, 1989	Order of Supreme Court, Albany County (Cheeseman, J) granting plaintiffs' motions for preliminary injunction (Index Nos. 7-89; 8-89)
Jan. 20, 1989	Verified Answer (Index No. 7-89) Supreme Court, Albany County
Jan. 20, 1989	Verified Answer (Index No. 8-89) Supreme Court, Albany County
April 3, 1989	Plaintiff's Notice of Motion for Summary Judgment (Index No. 7-89) Supreme Court, Albany County
April 3, 1989	Affidavit of Rosemary Saffire in support of plaintiff's motion for summary judgment (Index No. 7-89) Supreme Court, Albany County

April 24, 1989	Plaintiff's notice of motion for summary judgment (Index No. 8-89) Supreme Court, Albany County
April 24, 1989	Affidavit of Elias H. Attea, Jr. in support of plaintiff's motion for summary judgment (Index No. 8-89) Supreme Court, Albany County
May 26, 1989	Defendants' Notice of Cross-Motion for Summary Judgment (Index No. 7-89) Supreme Court, Albany County
May 26, 1989	Affadavit of Jamie Woodward in opposition to plaintiff's motion for summary judgment and in support of defendants' cross-motion for summary judgment (Index No. 7-89) Supreme Court, Albany County
May 26, 1989	Affidavit of William F. Collins in opposition to plaintiff's motion for summary judgment and in support of defendants' motion for summary judgment (Index No. 7-89) Supreme Court, Albany County
May 26, 1989	Defendants' Notice of Cross-Motion for Summary Judgment (Index No. 8-89) Supreme Court, Albany County

May 26, 1989	Affidavit of Jamie Woodward in opposition to plaintiff's motion for summary judgment and in support of defendants' cross-motion for summary judgment (Index No. 8-89) Supreme Court, Albany County
May 26, 1989	Affidavit of William F. Collins in opposition to plaintiff's motion for summary judgment and in support of defendants' cross-motion for summary judgment (Index No. 8-89) Supreme Court, Albany County
May 30, 1989	Affidavit of Joseph E. Zdarsky in support of plaintiff's motion for summary judgment and in reply to defendants' papers (Index No. 7-89) Supreme Court, Albany County
May 30, 1989	Affidavit of Timothy M. O'Mara in support of plaintiff's motion for summary judgment and in reply to defendants' papers (Index No. 8-89) Supreme Court, Albany County
May 30, 1989	Oral argument on plaintiffs' motions for summary judgment and defendants' cross-motions for summary judgment (Index Nos. 7-89; 8-89) Supreme Court, Albany County

June 5, 1989	Decision of Supreme Court, Albany County (Cheeseman, J.) granting summary judgment to plaintiffs (Index Nos. 7-89; 8-89)
Aug. 22, 1989	Order and Judgment of Supreme Court, Albany County (Cheeseman, J.) granting plaintiffs declaratory and permanent injunctive relief (Index Nos. 7-89; 8-89)
Sept. 21, 1989	Defendants' Notice of Appeal to the Appellate Division, Third Department (Index No. 7-89) Supreme Court, Albany County
Sept. 21, 1989	Defendants' Notice of Appeal to the Appellate Division, Third Department (Index No. 8-89) Supreme Court, Albany County
Oct. 16, 1990	Oral argument before the Appellate Division, Third Department (Index Nos. 7-89; 8-89)
Dec. 6, 1990	Original decision of Appellate Division, Third Department (Index Nos. 7-89; 8-89)
Jan. 8, 1991	Original order of Appellate Division, Third Department (Index No. 7-89; 8-89)

March 8, 1991	Defendants' Notice of Appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89) Supreme Court, Albany County
May 9, 1991	Order of New York Court of Appeals dismissing defendants' appeal taken as of right (Index Nos. 7-89; 8-89)
July 2, 1991	Defendants' motion for leave to appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89) New York Court of Appeals
July 19, 1991	Affidavit of Joseph E. Zdarsky in opposition to defendant's motion for permission to appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89) New York Court of Appeals
July 19, 1991	Affidavit of Timothy M. O'Mara in opposition to defendants' motion for permission to appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89) New York Court of Appeals
Sept. 12, 1991	Order of New York Court of Appeals denying defendants' motion for permission to appeal to the New York Court of Appeals (Index Nos. 7-89; 8-89)

Nov. 26, 1991	Petition for writ of certiorari for defendants (Docket No. 91-907) United States Supreme Court
Dec. 26, 1991	Respondents' Brief in opposition (Docket No. 91-907) United States Supreme Court
Jan. 21, 1992	Order of United States Supreme Court granting petitioners' petition for a writ of certiorari and vacating the judgment of the Appellate Division, Third Department, and remanding the case for further consideration (Docket No. 91-907)
June 2, 1992	Oral argument on remand before the Appellate Division, Third Department (Index Nos. 7-89; 8-89)
July 9, 1992	Opinion and order of Appellate Division, Third Department on remand (Index Nos. 7-89; 8-89)
July 14, 1992	Plaintiff's Notice of Appeal to New York Court of Appeals (Index No. 7-89) Supreme Court, Albany County
July 14, 1992	Plaintiff's Notice of Appeal to New York Court of Appeals (Index No. 8-89) Supreme Court, Albany County

April 28, 1993	Oral argument before New York Court of Appeals (Index Nos. 7-89; 8-89)
June 10, 1993	Opinion of New York Court of Appeals (Index Nos. 7-89; 8-89)
June 10, 1993	Order of New York Court of Appeals (Index Nos. 7-89; 8-89)
Sept. 7, 1993	Petition for writ of certiorari for defendants (Docket No. 93-377) United States Supreme Court
Nov. 1, 1993	Order of United States Supreme Court granting petitioners' petition for a writ of certiorari

Summons (Index No. 7-89).

STATE OF NEW YORK

SUPREME COURT
COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Plaintiff

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants

Index No. 7-89

To the above named Defendant(s):

YOU ARE HEREBY SUMMONED AND REQUIRED to serve upon the Plaintiff's attorney, at the address stated below, a written Answer to the attached Complaint.

If this Summons is served upon you within the State of New York by personal service you must respond within twenty (20) days after service, not counting the day of service. If this Summons is not personally delivered to you within the State of New York you must respond within

THIRTY (30) days after service is completed, as provided by law.

If you do not respond to the attached Complaint within the applicable time limitation stated above a Judgment will be entered against you, by default, for the relief demanded in the Complaint, without further notice to you.

This action is brought in the County of Defendant's residence because of: Designation made by Plaintiff.

Dated: December 20, 1988

KAVINOKY & COOK
Attorney(s) for Plaintiff(s)
Office, Post Office Address and
Telephone
120 Delaware Avenue
Buffalo, New York 14202
Tel: (716) 845-6000

Verified Complaint (Index No. 7-89).

STATE OF NEW YORK

SUPREME COURT
COUNTY OF ALBANY
[Same Title]

Plaintiff by its attorneys Kavinoky & Cook for its complaint herein alleges as follows:

1. At all times hereinafter mentioned, plaintiff Milhelm Attea & Bros., Inc. a/k/a Milhelm Attea & Brothers, Inc. a/k/a Milhem Attea Brothers, Inc. (hereinafter referred to as "Attea"), was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business in the State of New York at the address specified above.

2. Upon information and belief, defendant James W. Wetzler is the Commissioner of Taxation and Finance of the State of New York, and the head of defendant Department of Taxation and Finance of the State of New York (the "Department of Taxation and Finance").

3. Upon information and belief, defendant James W. Wetzler, as the Commissioner of Taxation and Finance is responsible, pursuant to §170 and §171 of the Tax Law of the State of New York, for the administration of the Tax Laws of the State of New York.

4. Upon information and belief, defendant Tax Appeals Tribunal of the State of New York (the "Tax Appeals Tribu-

nal") is a body consisting of three commissioners responsible for the administration of the division of tax appeals pursuant to Article 40 of the New York Tax Law.

5. At all times hereinafter mentioned, plaintiff was and still is a wholesale dealer of cigarettes licensed under New York Tax Law §480, and was and still is engaged in, among other things, the wholesale distribution and sale of cigarettes in New York, and was and still is an agent appointed by the New York State Tax Commission to purchase and affix cigarette tax stamps pursuant to New York Tax Law §471.

6. At all times pertinent, plaintiff Attea was and still is distributing and making wholesale sales of cigarettes to Indians on Indian reservations located within the territorial boundaries of the State of New York, which Indian reservations include, but are not limited to, the Allegany Indian reservation, the Cattaraugus Indian reservation, the Tuscarora Indian Reservation, the Onondaga Indian Reservation and the Saint Regis Indian Reservation, which reservations are sovereign territories of sovereign American Indian Tribes.

7. Pursuant to New York Tax Law §471, a tax is imposed on all cigarettes possessed in the state by any person for sale, subject to certain exceptions, including the exception that "no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax. . . ."

8. The State of New York does not have the power to impose or levy cigarette taxes pursuant to Article 20 of the

New York Tax Law with respect to the aforesaid sales of cigarettes by plaintiff to Indians on Indian reservation nor does the State of New York have the power to regulate such business transactions conducted on Indian reservations, because, *inter alia*, pursuant to the United States Constitution, Article 1, section 8, clause 3, Congress has the sole power to regulate commerce with the Indian Tribes and the laws of the United States enacted pursuant thereto, in particular, the Indian trader statutes, 25 U.S.C. §§261 *et seq.*, and regulations enacted thereunder which govern trade with Indians on Indian reservations, have pre-empted such state taxes, laws and regulations.

9. In addition, Indians on Indian reservations are immune from state taxation unless such state taxation is specifically authorized by the Congress of the United States.

10. The defendants have long recognized the tax immunity of Indians on Indian reservations, and the pre-emptive effect of federal law with respect to wholesale sales of cigarettes by plaintiff Attea to such Indians, since, for several years, the defendants have accepted and approved, after audit, plaintiff Attea's monthly Resident Agent Cigarette Tax Returns, form CG-6, which reflect such wholesale sales of Schedule D to such returns, entitled "Sales and Transfers of Unstamped Cigarettes within the State," for which no New York cigarette taxes were collected or charged.

11. Notwithstanding the foregoing, and on or about August 29, 1987, defendant James W. Wetzler as Commissioner of Taxation and Finance and as the head of defendant Department of Taxation and Finance of the State of New York adopted certain regulations which purport to apply New York's Tax Law to plaintiff's sales of cigarettes to

Indians on Indian reservations and require the collection of New York cigarette taxes with respect to such sales as well as comprehensively regulate such sales. A copy of such regulations (hereinafter referred to as the "New Regulations") is annexed hereto as Exhibit "A."

12. The New Regulations, by their very terms, became effective on November 30, 1988; provided, however, that from such date of effectiveness to and including December 31, 1988, the New York Regulations provide for a grace period when the defendants will register Indian Tribes and "registered dealers" as that term is defined in the New Regulations.

13. By reason of the foregoing, the New Regulations are in full force and effect and by their terms, purport to apply to transactions occurring on and after January 1, 1989. *See*, New Regulations, pages 17-18.

14. Pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indians on Indian reservations in New York, except as to certain limited quantities approved by the defendant Department of Taxation and Finance or in some circumstances as agreed between defendant Department of Taxation and Finance and the Indian Tribe, subject to the other terms and limitations of such New Regulations. *See*, New Regulations pages 11-15, §§335.5(e); 335.5(b)(3), *et. seq.*

15. Furthermore, pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New

York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indians on Indian reservations in New York, unless such cigarettes are sold to certain Indians on such reservations who fulfill comprehensive requirements of defendant Department of Taxation and Finance, including registration with said defendant as a "Registered Dealer", subject to the other terms and limitations of such New Regulations. *See*, New Regulations, pages 7-8, 11-12, §§335.4(e), 335.5(b).

16. Furthermore, pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indian Tribes or nations in New York unless such Tribes or nations themselves obtain a valid exempt organization certificate issued by defendant Department of Taxation and Finance, and otherwise comply with the terms and limitations of such New Regulations. *See*, New Regulations, pages 5-6, §335.4(c).

17. Pursuant to the New Regulations, defendants also seek to impose upon wholesale distributors such as plaintiff Attea certain additional and special record keeping requirements with respect to sales to Indians on Indian reservations, including but not limited to receiving and retaining exemption certificates from Indian purchasers of untaxed cigarettes sold by plaintiff pursuant to the regulations, copies of invoices or other written evidence of such sales signed by the Indian purchasers taking delivery of such cigarettes, records of the Tribe's exempt organization number or the Registered Dealer's registration number, and other documents, all subject to the terms and limitations of

such New Regulations. *See,* New Regulations, pages 6-7, §335.4(a).

18. Because Article 20 of the Tax Law, and in particular, Tax Law §471 thereof, expressly provides that "no tax shall be imposed on cigarettes sold under circumstances that this state is without power to impose such tax . . .," the aforesaid statute which imposes such cigarette taxes, by its own terms, does not apply to the sale and delivery of cigarettes made by plaintiff to Indians on Indian reservations as set forth above and, by reason of the foregoing, the New Regulations adopted by the defendants cannot be enforced with respect to sales made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York.

19. In addition to the foregoing, to the extent that Article 20 of the New York Tax Law may be applied by defendants to plaintiff's transactions with Indians on Indian reservations, and to the extent that any of the provisions of Article 20 of the New York Tax Law do not, by their terms, expressly provide that same are not applicable to sales of the cigarettes made when "sold under such circumstances that this state is without power to impose such tax . . .," said provisions are unconstitutional on their face or insofar as same are applied or may be applied pursuant to the New Regulations or otherwise to the sales of cigarettes made by plaintiff to Indians on Indian reservations and, by reason of the foregoing, said provisions and such application are preempted by federal law.

20. In addition to the foregoing, Indians on Indian reservations are immune from such State taxation and cannot be compelled, pursuant to the New Regulations or otherwise, to

pay cigarette taxes to the plaintiff with respect to plaintiff's wholesale sales of cigarettes to Indians on Indian reservations.

21. Plaintiff's Indian customers are desirous of making wholesale purchases of cigarettes from the plaintiff but have refused to pay States taxes to the plaintiff with respect to such purchases and have otherwise refused to be regulated by the defendant Department of Taxation and Finance with respect to such purchases.

22. By reason of the foregoing, there is presented for consideration and determination in this action the question of the power and jurisdiction of the defendants to impose cigarette taxes upon plaintiff's wholesale sales of cigarettes to Indians on Indian reservations, and the question of the power and jurisdiction of the defendants to otherwise regulate such transactions.

23. A declaratory judgment with respect to the issue herein involved will settle directly, expeditiously and with finality the aforesaid controversy.

24. Plaintiff will suffer irreparable damage and is without an adequate remedy at law and is therefore entitled to a declaratory judgment of its rights regarding the application and legal effect of New York's Tax Law upon plaintiff in connection with the subject of this action, and is entitled to a preliminary and permanent injunction against the defendants in connection therewith, because of the foregoing reasons and for the following additional reasons:

(a) Plaintiff will unnecessarily be subjected to various administrative proceedings before defendant New York Tax Appeals Tribunal in order to contest any determinations hereinafter made by the defendants with respect to sales made by plaintiff to Indians or Indian reservations subsequent to the effective date of the New Regulations, which administrative proceedings will involve lengthy and costly hearings and which plaintiff believes will result in a finding by the said defendant confirming any assessments of cigarette taxes, interest and penalties against plaintiff with respect to any such sales;

(b) As a condition precedent to a court review of any such determinations by the defendant Tax Appeals Tribunal, plaintiff is required either to deposit with defendant Department of Taxation and Finance all taxes, interest and penalties which may be claimed to be due by the defendants or to post a bond or undertaking for such amounts, including costs, which requirements will effectively preclude court review of this issue, since plaintiff does not have the financial ability to comply with such requirements;

(c) As a matter involving the applicability and/or constitutionality of the Tax Law and its application to plaintiff, plaintiff is entitled to have same determined by a court of competent jurisdiction; and

(d) Plaintiff Attea's sales to Indians on Indian reservations in New York constitute approximately 75% - 80% of plaintiff's total sales. Plaintiff Attea has incurred substantial expenses for equipment to service its Indian accounts, including an IBM 36 computer system plus expensive software for same, and plaintiff has discontinued product lines in order to allow it to accommodate its Indian customers. In

addition, plaintiff has lost substantial non-Indian customers as a result of negative publicity generated by defendants concerning plaintiff's sales to Indians on Indian reservations. Moreover, plaintiff has substantial accounts receivable due from Indian customers, in excess of $100,000. Since all or a substantial number of plaintiff's Indian customers refuse to pay New York State taxes with respect to their purchases on Indian reservations, defendants threatened application of the Tax Law to these transactions will result in a substantial loss of business, the inability of plaintiff to collect its accounts receivable from Indians, and most likely will result in the total destruction of plaintiff's business.

25. By reason of the foregoing, plaintiff is entitled to a declaratory judgment:

(a) That the State of New York is without power to impose the aforesaid cigarette taxes with respect to any of the sales made or hereafter made by plaintiff to Indians on Indian reservations by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(b) That insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the New York Tax Law does not apply by its express terms to the sale of cigarettes by plaintiff to Indians on Indian reservations, and insofar as the Tax Law of the State of New York does not expressly so provide, and purports to impose the aforesaid cigarette taxes with respect to such sales, such provisions are unconstitutional;

(c) That the State of New York is otherwise without power to regulate or interface with sales of cigarettes made by plaintiff to Indians on Indian reservations and, as a result thereof, is without power to enact or enforce the New Regulations insofar as plaintiff's wholesale sales to Indians on Indian reservations are concerned; and

(d) That any assessments of cigarette taxes against plaintiff by defendants which may be imposed under and pursuant to the New Regulations or otherwise with respect to plaintiff's wholesale sales of cigarettes to Indians on Indian reservations are unconstitutional, illegal, null and void and of no effect.

26. By reason of the foregoing, plaintiff is also entitled to a preliminary and permanent injunction restraining and enjoining the defendants, and each of them, or any of their respective agents, employees or other persons under their control:

(a) From determining, collecting or attempting to collect cigarette taxes with respect to the sales of cigarettes made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

(b) From commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of said sales;

(c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New

York or the New Regulations by reason of or in connection with such sales; and

(d) From otherwise interfering, regulating or attempting to interfere or regulate any such sales.

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, as follows:

(i) Judgment declaring:

(a) That the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(b) That, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such states, it is unconstitutional and/or pre-empted by federal law; and

(c) That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made

by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York and, by reason thereof, the New Regulations, insofar as they purport to provide that such sales are subject to State taxes or regulation, are null and void and of no force and effect.

(ii) Judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, enjoining and restraining said defendants and persons preliminarily and permanently:

(a) From determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

(b) From commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of or in connection with said sales; and

(c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales.

(iii) Judgment for the costs and disbursements of this action and

(iv) Judgment for such other and further relief as to the Court may seem just and proper.

Dated: Buffalo, New York
December 20, 1988

KAVINOKY & COOK
Attorneys for Plaintiff
Office and P.O. Address
120 Delaware Avenue
Buffalo, New York 14202
Tel: (716) 845-6000

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF ERIE)

Rosemary Saffire, being duly sworn, deposes and says that she is the Secretary of Milhelm Attea & Bros., Inc.; that she has read the foregoing Complaint and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters she believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by plaintiff is because Milhelm Attea & Bros., Inc. is a corporation and the grounds of deponent's belief as to all matters in the within Complaint, not stated upon her own knowledge, are based upon investigations which deponent has caused to be made concerning

the subject matter of this action and information acquired by deponent in the course of her duties as an officer of said corporation and from the books and papers of said corporation.

Rosemary Saffire

Subscribed and sworn to before me
this 20th day of December, 1988.

GERALD T. WALSH
Notary Public, State of New York
Qualified in Erie County
My Commission Expires April 4, 1990

Exhibit "A", Annexed to Complaint—New Regulations

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
COMMISSIONER OF TAXATION AND FINANCE
ALBANY, NEW YORK

Pursuant to the authority contained in subdivision First of section 171 and section 475 of the Tax Law, the Commissioner of Taxation and Finance, at an open meeting held on even date with the signing of this rule, hereby makes and adopts the following amendments to its regulations pertaining to the Cigarette Tax, by renumbering sections 331.6, 331.7 and 331.8 of Part 331 to be sections 331.7, 331.8 and 331.9 respectively, by adding new sections 331.6, and 331.10 to Part 331 and by renumbering the second section 335.2 of Part 335 to be section 335.3, and by adding new sections 335.4 and 335.5 to Part 335 of Subchapter C of such regulations, as published in Chapter III of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, to read as follows:

Section 1. Sections 331.6, 331.7 and 331.8 of Part 331 of the Cigarette Tax regulations are hereby renumbered to be sections 331.7, 331.8 and 331.9, respectively; and the heading of Part 331 of such regulations is hereby amended to read as follows;

PART 331
Definitions
(Statutory authority: Tax Law, §171; art. 20)

Sec.
331.1 Cigarette defined
331.2 Sale defined
331.3 Use defined
331.4 Wholesale dealer defined
331.5 Retail dealer defined
[331.6 Agent defined
331.7 City defined
331.8 State defined]
331.6 Registered dealer defined
331.7 Agent defined
331.8 City defined
331.9 State defined
331.10 Definitions relating to sales on qualified Indian reservations

Section 2. New section 331.6 is added to Part 331 of such regulations, to read as follows:

331.6 Registered dealer defined. A registered dealer is:

(a) an Indian or non-Indian retail dealer (including but not limited to a dealer who has either a valid Indian Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who (1) registers with the Department of Taxation and Finance, and (2) makes or intends to make qualified sales of cigarettes on a qualified reservation; or,

(b) a qualified Indian who is a wholesale dealer (including, but not limited to, a dealer who has either a valid Indian

Trader's License issued by the United States Department of the Interior, Bureau of Indian Affairs, or a valid license issued by an exempt Indian nation or tribe), who (1) registers with the Department of Taxation and Finance and (2) makes or intends to make qualified sales of cigarettes on qualified reservations. No fee is charged for this registration. See, sections 335.4 and 335.5 of Part 335 of this Subchapter regarding the duties and obligations of registered dealers.

Section 3. New section 331.10 is hereby added to such Part, to read as follows:

331.10 Definitions relating to sales on qualified Indian reservations. (a)(1) "Qualified Indian" means a person duly enrolled on the tribal rolls of one of the exempt Indian nations or tribes.

(2) "Qualified Indian consumer" means a qualified Indian who purchases or intends to purchase cigarettes within the boundaries of a qualified reservation for his or her own use and consumption (i.e. other than for resale).

(b) "Exempt Indian nation or tribe" means one of the following New York State Indian nations or tribes : Cayuga, Oneida Indian Nation, Onondaga Nation of Indians, Poospatuck, Saint Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians.

(c) "Qualified reservation" means the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian

reservation, Poospatuck Indian reservation, St. Regis Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation.

(d) "Qualified sale" means a sale of cigarettes made on a qualified reservation by an agent, an exempt Indian nation or tribe, or a registered dealer, without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a registered dealer, or a qualified consumer.

Section 4. The second section 335.2 of Part 335 of such regulations, relating to sales made to the State and its subdivisions, is renumbered to be section 335.3 of such Part; and the heading of Part 335 is hereby amended to read as follows:

PART 335

NONTAXABLE SALES AND USES

(Statutory authority: Tax Law, §171; art.20)

Sec.
335.1 Nontaxable sales
335.2 Nontaxable uses
[335.2] 335.3 Sales to the State and subdivisions
335.4 Indian nations or tribes, qualified Indian consumers and registered dealers
335.5 Qualified sales of cigarettes on qualified reservations

Section 5. New sections 335.4 and 335.5 are added to such Part, to read as follows:

335.4 Indian nations or tribes, qualified Indian consumers and registered dealers. (a) General. As provided for in this section and in section 335.5 of this Part, exempt

Indian nations or tribes, qualified Indian consumers and registered dealers may purchase, on qualified reservations, cigarettes without prepaying and precollecting the cigarette tax imposed by Article 20 of the Tax Law.

(b) Cigarette stamps. Although stamps are usually affixed to packages of cigarettes as evidence of payment of the tax, the Commissioner of Taxation and Finance may authorize the use of a special stamp in order to clearly identify packages of cigarettes which are intended for nontaxable sale to qualified Indians on qualified reservations. If such special stamps are so authorized, the special stamps constitute documentary evidence of non-payment of the tax and, if possessed by a registered dealer or an Indian for resale outside the boundaries of a qualified reservation, or by a non-Indian or a non-qualified Indian, such specially stamped cigarettes are deemed to be unstamped cigarettes. Cigarettes, upon which the tax has not been prepaid and precollected, and which bear such special stamp may not be sold to non-Indians or non-qualified Indians under any circumstances. In addition, any such specially stamped cigarettes may not be sold outside the boundaries of a qualified reservation, unless such sale is specifically authorized by this Part.

(c) Indian nations or tribes. (1) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not precollected and prepaid the cigarette tax for its own use and consumption, or for making qualified sales, provided that the nation or tribe: (i) holds a valid exempt organization certificate issued by the New York State Department of Taxation and Finance; (ii) takes delivery of the cigarettes on its qualified reservation; and, (iii) uses, or intends to use,

such cigarettes for its own official use and consumption, or to make qualified sales.

(2) An exempt Indian nation or tribe may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller a properly completed certificate of exemption for qualified Indian nations or tribes. Such exemption certificate must disclose the Indian nation's or tribe's exempt organization number referred to in subdivision (b) of section 529.9 of this Title.

(3) Failure to comply with any of the provisions of Article 20 of the Tax Law with respect to cigarettes, or any rule or regulation pursuant to such Article, may result in the cancellation or suspension of the authority of such nation or tribe to purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax for purposes of making qualified sales.

(d) Qualified Indian consumers. (1) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, if such individual: (i) takes delivery of the cigarettes on a qualified reservation; and (ii) purchases the cigarettes for such individual's own use or consumption within such reservation.

(2) A qualified Indian consumer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax, by issuing to the seller of the cigarettes a properly completed certificate of individual Indian exemption for certain taxes on property delivered on a reservation.

(e) Registered dealers. (1) Registration of dealers. Upon application, the Department of Taxation and Finance may register an applicant and issue a certificate of registration as a dealer of cigarettes to him, if the applicant:

(i)(A) is an Indian or non-Indian retail dealer who or which makes, or intends to make, qualified sales within the boundaries of a qualified reservation; or (B) is a qualified Indian, who is also a subjobber, broker or wholesale dealer, who makes, or intends to make, qualified sales within the boundaries of a qualified reservation;

(ii)(A) has no outstanding liability for any taxes or other amounts imposed pursuant to the Tax Law which has finally been determined to be due from such applicant, and (B) is properly licensed or registered for any applicable taxes (e.g. that the applicant has a valid certificate of authority for the sales tax pursuant to Tax Law section 1132(c)); and,

(iii)(A) provides evidence to the Department that he has complied (or will comply) with any applicable tribal regulations and/or licensing procedures, and (B) has no outstanding liability for any applicable taxes or other sums which may be imposed by an Indian nation or tribe, and which has finally been determined to be due from such applicant.

(2) Unless so registered, or otherwise specifically provided for in this Part, no person shall sell cigarettes within a qualified reservation without prepayment and precollection of the cigarette tax.

(3) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the ciga-

rette tax for purposes of making qualified sales, provided that the registered dealer: (i) has received from the Department a valid certificate of registration as a dealer of cigarettes; (ii) takes delivery of such cigarettes within the boundaries of his qualified reservation; and, (iii) uses or intends to use such cigarettes to make qualified sales.

(4) A registered dealer may purchase cigarettes upon which the seller has not prepaid and precollected the cigarette tax by issuing to the seller of such cigarettes a properly completed certificate of exemption. Such exemption certificate must indicate such dealer's registration number.

(5) Failure to comply with any of the provisions of Article 20 of the Tax Law with respect to cigarettes, or any rule or regulation pursuant to such Article, may result in the cancellation or suspension of the registration as a dealer in cigarettes.

(f) Exemption certificates and other records. (1) The exemption certificates prescribed in subdivisions (c), (d) and (e) of this section must be completed by the purchaser and given to the seller of cigarettes upon which the tax has not been prepaid and precollected, at the time of an initial purchase. A separate exemption certificate need not be given for each additional purchase of cigarettes, provided that each delivery of such cigarettes is substantiated as being exempt from tax with an additional bill, invoice, receipt or other form of written evidence given by the seller showing the exempt Indian nation or tribe, qualified Indian consumer, or registered dealer as the purchaser.

(2) Every bill, invoice, receipt or other form of written evidence given by the seller must indicate the quantity of cigarettes delivered, the purchase price of the cigarettes without regard to any exemption and the price paid or to be paid by the exempt purchaser for such product. In addition, such evidence of each exempt transaction must be retained by the seller; and must be signed and dated by the individual taking delivery of the cigarettes. In the case of a purchase by an exempt Indian nation or tribe, such evidence must also indicate such nation's or tribe's exempt organization number. In the case of a purchase by a registered dealer, such evidence must also indicate the dealer's registration number.

(3) Sellers of cigarettes upon which the tax has not been prepaid and precollected must establish an acceptable system of associating these individual bills, invoices, receipts and other forms of written evidence with the applicable tax exemption certificates initially received from the purchasers.

(4) A licensed cigarette tax agent must report all sales of cigarettes to exempt Indian nations or tribes, qualified Indian consumers and registered dealers in its monthly cigarette tax returns.

335.3 Qualified sales of cigarettes on qualified reservations. (a) General applications. (1) The cigarette tax imposed pursuant to Article 20 of the Tax Law is not required to be prepaid and precollected when cigarettes are sold under circumstances which preclude the imposition of the tax by reason of the United States Constitution and any laws of the United States enacted pursuant thereto.

(2) Federal constitutional and statutory principles relating to Indian sovereignty, preempt the application of a state cigarette excise tax to a sale of cigarettes on a qualified reservation, if such product is ultimately purchased on such reservation by a qualified Indian for his own personal use and consumption. Consistent with such federal principles, sales of cigarettes on a qualified reservation to a non-Indian and non-qualified Indian are subject to the tax if the ultimate incidence of, and liability for, the tax is upon the non-Indian or non-qualified consumer. Additionally, consistent with such principles, all sales of cigarettes made within a state and outside the boundaries of a qualified reservation—regardless of whether the seller and/or the purchaser is an exempt Indian nation or tribe, a registered dealer, or a qualified Indian consumer—are subject to the state cigarette excise tax.

(b) Sales by agents. (1) An agent licensed by the Department of Taxation and Finance to purchase and affix stamps may possess cigarettes upon which the tax has not been prepaid and precollected for purposes of making qualified sales, if that agent—with the prior approval of the Department of Taxation and Finance, or, if applicable, of an exempt Indian nation or tribe—sells and delivers such cigarettes to: (i) an exempt Indian nation or tribe; (ii) a registered dealer; or (iii) a qualified Indian consumer.

(2) No person other than a duly licensed cigarette stamping agent (and its employees while working for such agent) may possess cigarettes for sale in this state and transport such cigarettes onto a qualified reservation located in this state without prepaying and precollecting the cigarette tax. However, as provided in section 335.4 of this Part, subsequent qualified sales may be made solely on such qualified

reservation. Properly completed exemption certificates must be received by all sellers of cigarettes located on qualified reservations, where the tax has not been prepaid and precollected.

(3) In order to administer the cigarette tax with respect to the sale of cigarettes on qualified reservations consistent with federal constitutional and statutory principles, a cigarette stamping agent may sell and deliver cigarettes without prepayment and precollection of the cigarette tax to an exempt Indian nation or tribe, a qualified Indian consumer, or a registered dealer; provided that such agent complies with the applicable provisions of subdivisions (c) and (d) of this section with respect to approval of the amount of such cigarettes to be sold and delivered, and further complies with all of the requirements of this Subchapter.

(c) Approval for delivery required. (1) If an exempt Indian nation or tribe agrees with the Department to regulate, license, or control the sale and distribution within its qualified reservation of an agreed upon amount of cigarettes upon which the seller has permissibly not prepaid and precollected the cigarette tax, then an agent must obtain the approval of that nation or tribe regarding the agreed upon amount of cigarettes to be sold and delivered without prepayment and precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(2) In the absence of such an agreement regarding the sale and distribution of cigarettes upon which the tax has not been prepaid and precollected, the agent must obtain the approval of the Department regarding the amount of cigarettes to be sold and delivered without prepayment and

precollection of such tax, prior to each such sale and delivery of any such cigarettes on such reservation.

(d) Basis for approval by Department. If applicable, Departmental approval for delivery will be based upon evidence of valid purchase orders received by the agent of quantities of cigarettes reasonably related to the probable demand of qualified Indian consumers in the trade territory of the exempt Indian nation or tribe (if such nation or tribe chooses to make qualified sales), or registered dealer.

(1) In determining such probable demand, the Department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such probable demand (e.g. records of previous sales to qualified Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence, etc.); or,

(ii) in the absence of such regulation or such evidence, calculate such demand based upon the New York average consumption per capita, as compiled for the most recently completed calendar or fiscal year, multiplied by the number of enrolled members of the affected nation or tribe (or, if such membership numbers are unavailable, by the reservation service area population, as compiled by the federal Bureau of Indian Affairs).

(2) In determining such trade territory, the Department will:

(i) in the event that an exempt Indian nation or tribe regulates, licenses or controls the sale and distribution of cigarettes within its reservation, consult with such nation or tribe regarding any evidence it may submit relating to such regulated and/or licensed sellers located on its reservation; or

(ii) in the absence of such regulation or such evidence, calculate such trade territory based upon the information at its disposal.

(3) In addition, the Department will also take into consideration any evidence submitted by a registered dealer relating to such probable demand and to that dealer's trade territory (e.g. a verified record of previous sales to qualified Indian consumers, evidence of the number of qualified Indian consumers located within a reasonable distance of the dealer's place of business, records indicating the percentage of such trade historically realized by the dealer, or other statistical evidence in support of the proposed transaction).

(4) In the absence of any such evidence by an exempt Indian nation or tribe or a registered dealer, the Department may restrict the total deliveries to any reservation of cigarettes, upon which the tax has not been prepaid and precollected, to an amount calculated pursuant to paragraphs (1)(ii) and (2)(ii) of this subdivision.

(5) Approval for sale or delivery to an exempt nation or tribe or to a registered dealer will be denied where the Department finds that such nation or tribe, or dealer are or have been making sales in violation of this Subchapter.

(e) Limitations on sales. Exempt Indian nations or tribes, qualified Indian consumers, and registered dealers may purchase cigarettes upon which the seller has not prepaid and precollected the tax, only to the extent provided in this section and in section 335.4 of this Part. Such Indian nations or tribes, consumers, and dealers, who or which purchase cigarettes under any other circumstances must prepay and precollect the cigarette tax at the time of purchase by way of remitting the tax to the seller as part of the purchase price of the cigarettes.

Section 6. This rule shall be promulgated immediately; provided, however, that this rule shall not apply where and to the extent that alternative reporting and/or tax mechanisms have been negotiated between the Executive Branch of the State of New York acting by the Department of Taxation and Finance and any State or federally recognized Indian nation occupying a State or federally recognized reservation and acting by a tax committee or other duly-authorized negotiating entity, and the agreement resulting from such negotiations has, to the extent required by law, either been approved by enacted amendments to the laws of the State of New York and relevant tribal laws, or has been jointly submitted by the Executive Branch and such Indian nation or nations to the New York State Legislature for its consideration and approval; provided, further, the provisions of this rule shall be effective on November 30, 1988; provided, further, that during the first thirty-one days after this rule shall take effect, the Department of Taxation and Finance will register applicants who, or which, wish to make qualified sales of cigarettes on qualified reservations; provided, further, that the amendments of this rule which limit the sale of cigarettes upon which the tax has not been

passed through by cigarette tax agents shall take effect on the thirty-first day after the day this rule is effective.

Dated: Albany, New York
August 29, 1988

/s/ James W. Wetzler
James W. Wetzler
Commissioner of Taxation and Finance

Order to Show Cause (Index No. 7-89).

At an IAS Special Term, Part ____ of the Supreme Court of the State of New York held in and for the County of Albany, at the Albany County Courthouse, Albany, New York, on the 30th day of December, 1988.

Present: Hon. EDWARD S. CONWAY, Justice Presiding

[Same Title]

Upon the summons and complaint herein, verified on the 20th day of December, 1988, and the affidavit of Rosemary Saffire, sworn to the 20th day of December, the affidavit of Eli Tarbell, sworn to the 19th day of December, 1988, and the respective exhibits annexed thereto, it is

ORDERED, that the defendants show cause before this court at Term, ____ to be held at the Albany County Courthouse, Albany, New York, on the 9th day of January, 1989 of that day why an order should not be entered herein, pursuant to CPLR 6311, granting plaintiff a preliminary injunction enjoining and restraining the defendants, and each of them, and their respective agents, employees or other persons acting under their direction or control: (a) from determining, collecting or attempting to collect cigarette taxes with respect to the sales of cigarettes made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative pro-

ceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of said sales; (c) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the regulations promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering, regulating or attempting to interfere or regulate any such sales; and it is further

ORDERED, that defendants, and each of them, show cause why an order should not be entered granting the plaintiff such other and further relief as to this court may seem just and proper; and it is further

ORDERED, that service of a copy of this order, together with the papers annexed hereto on the defendants and the Attorney General of the State of New York before the 30th day of December, 1988, shall be deemed sufficient service hereof.

s/ EDWARD S. CONWAY
Justice of the Supreme Court
Albany County

Signed: 12-30-88
Albany, NY

Exhibit "D" Annexed to Affidavit of Saffire. Notice to Registered Distributors of Motor Fuel, Diesel Motor Fuel and Licensed Cigarette Agents Regarding Sales of Tax-Free Product on Indian Reservations

The Department of Taxation and Finance has amended its administrative systems to permit nontaxable sales of motor fuel, diesel motor fuel and cigarettes on Native American Indian reservations (located in New York) to nations and tribes, and their enrolled members for their own personal use.

Effective January 1, 1989, only registered distributors of motor fuel and diesel motor fuel and licensed cigarette agents may sell tax-free product either to an Indian nation or to a "registered dealer," under the conditions described below. The amount of tax-free product destined for sale on each reservation is based upon a determination of the probable consumption of qualified Indian consumers on each reservation. The reservation allotment of tax-free product will then be allocated among the registered dealers located on that reservation by means of a tax exemption coupon. There are no quantity limitations of tax-paid product sold to an Indian nation or registered dealer on a reservation.

Tax-Free Sales to Registered Dealers

A "registered dealer" is a retail or wholesale dealer located on a reservation who registers with the Department (under this new system) to purchase tax-free product for resale to Indian nations, other registered dealers, or qualified Indian consumers. Each month registered dealers will receive "Tax Exemption Coupon for Registered Dealers" from the Tax Department entitling them to make purchases of motor fuel, diesel motor fuel and/or cigarettes on which

the applicable prepaid excise and sales taxes have not been passed through.

To purchase tax-free product from you, the registered dealer must complete the tax exemption coupon, submit the Department copy (white) and the Distributor/Agent copy (pink) to you and keep the Dealer copy (yellow). The registered dealer must submit the tax exemption coupon to you before or at the time of delivery of the product.

You must keep the Distributor/Agent copy (pink) for your records and submit the Department copy (white) within 5 days of delivery of the tax-free product to the Audit Division / FACCTS - Indian Matters at the address on page 4.

You may sell tax-free product only to the registered dealer named on the coupon and deliver the product only to the locations specified on the coupon. In addition, the amount of tax-free product sold may not exceed the preprinted amount authorized by the coupon. If the sale exceeds the preprinted amount or if you do not obtain a coupon for a sale made to a registered dealer, you must collect all applicable taxes from the dealer for any portion exceeding the preprinted amount of the coupon. If you fail to do so, you will be held liable for the tax due.

Tax exemption coupons will be issued in denominations of 7,500 gallons for gas and diesel fuel and 400 packs for cigarettes, unless another quantity is specified by the registered dealer. If the actual amount sold is less than the preprinted amount of the coupon, the registered dealer should indicate the actual amount purchased in the space provided and present the coupon to you. Upon receipt of the coupon from you, the Department will issue the registered dealer another coupon for the difference between the preprinted amount and the actual amount sold.

Tax-Free Sales to Indian Nations

For Governmental Use

When you make a tax-free sale of motor fuel or diesel motor fuel to an Indian nation on a qualified reservation (for use or consumption and not for resale by such nation or tribe) you must obtain or already have on file a properly completed "Certificate of Tax Exemption for Qualified Indian Nations or Tribes on Purchases of Motor Fuel, Diesel Motor Fuel, and Cigarettes," Form FT-939, to substantiate the exempt status of the sale. (Exempt Indian nations and tribes and qualified reservations are listed on page 4.)

This exemption document may not be used to purchase tax-free product for resale by nation-owned or operated businesses.

For Resale

Nation-owned or operated businesses are subject to the reservation probable consumption limitations. Therefore, such businesses must use the tax exemption coupon as described above for registered dealers.

If the sale exceeds the preprinted amount of the coupon or if you do not obtain a coupon for a sale made to a nation business, you must collect all applicable taxes. If you fail to do so, you will be held liable for the tax due.

Reporting Tax-Free Sales

Distributors and agents must maintain accurate records of all sales, including the substantiation of exempt sales described above. The tax-free sales described in this notice

should be reported on the schedules and monthly returns as follows:

Motor Fuel

For the motor fuel excise tax, tax-free sales must be listed on "Combined Schedules 8 and 9 - Sales to the United States Government, N.Y. State and Municipalities." Indicate the registered dealer identification number for sales made to registered dealers and tribal businesses. Indicate the Indian nation's exempt organization number as it appears on the exemption document, Form FT-939. The total of this schedule is reported on line 13 of your "Return of Tax on Motor Fuels," Form MT-104.

For the prepaid sales tax, you take a credit for sales to exempt purchasers on line 10a of your "Report of Sales Tax Prepayment on Motor Fuel," Form FT-945.

Diesel Motor Fuel

For the diesel motor fuel excise tax, tax-free sales must be listed on "Schedule 9 - Sales to the United States Government, New York State and Municipalities." Indicate the registered dealer identification number for sales made to registered dealers and tribal businesses. Indicate the Indian nation's exempt organization number as it appears on the exemption document, Form FT-939. The total of this schedule is reported on the appropriate line of your "Return of Tax on Diesel Motor Fuel," Form MT-1000. (Line numbers on form MT-1000 are subject to change.)

For the prepaid sales tax, you take a credit for sales to exempt purchasers on line 4a of your "Report of Sales Tax Prepayment on Diesel Motor Fuel," Form FT-1045.

Cigarettes

For the cigarette excise tax, tax-free sales must be listed on "Sales of Cigarettes to Registered Dealers - Schedule D-1." Indicate the registered dealer identification number for sales made to registered dealers and tribal businesses. Indicate the Indian nation's exempt organization number as it appears on the exemption document, Form FT-939. The total of this schedule is reported on line 6B of your "Resident Agent Cigarette Tax Return," Form CG-6 or on line 9B of your "Non-Resident Agent Cigarette Tax Return," Form CG-7.

Should You Register As A Dealer?

Registered 12-A motor fuel or diesel motor fuel distributors, or licensed cigarette agents making retail sales on Indian reservations, must also register as dealers. You need not register if you merely accept tax exemption coupons from registered dealers or tribal businesses, or accept the exemption document for the nation's governmental uses (Form FT-939) from Indian nations.

Exempt Indian Nations and Tribes and Qualified Reservations

Nations and tribes

State and federal law define "exempt Indian nations and tribes" as the following New York State Indian nations and tribes:

Cayuga
Oneida Indian Nation
Onondaga Nation of Indians
Poospatuck
Saint Regis Mohawk
Seneca Nation of Indians
Shinnecock
Tonawanda Band of Senecas
Tuscarora Nation of Indians

Reservations

Qualified reservations are limited to the following reservations of exempt Indian nations and tribes located in New York State.

Allegany Indian Reservation
Cattaraugus Indian Reservation
Oil Spring Indian Reservation
Oneida Indian Territory
Onondaga Indian Reservation
Poospatuck Indian Reservation
Saint Regis Indian Reservation
Shinnecock Indian Reservation
Tonawanda Indian Reservation
Tuscarora Indian Reservation

If you need additional information or an application to become a registered dealer

Call: (518) 457-0465
or
Write: NYS Department of Taxation and Finance
Audit Division / FACCTS - Indian Matters
W. A. Harriman Campus
Albany, New York 12227

Summons (Index No. 8-89).

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

ELIAS H. ATTEA, JR., 6175 Stickler Street,
Clarence, NY 14031

Plaintiff,

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants.

Index No. 8-89

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with a summons, to serve a notice of appearance, on the plaintiff's attorney(s) within **20** days after the service of this summons, exclusive of the day of service, or within **30** days after completion of service where service is made in any other manner than by personal delivery within the State. In case of your failure to appear or answer, judgment may be taken against you by default for the relief demanded in the complaint.

Albany County is designated as the place of trial on basis of residence of the Defendants who resides at State Campus, Albany, NY

DATED:

Buffalo, New York
December 29, 1988

Timothy M. O'Mara, Esquire
WILLIAMS, STEVENS, McCARVILLE
& FRIZZELL, P.C.
1920 Liberty Building
Buffalo, New York 14202

Verified Complaint (Index No. 8-89).

[Same Title]

Plaintiff by his attorneys Williams, Stevens, McCarville & Frizzell, P.C. by Timothy M. O'Mara of council (sic) for its complaint herein alleges as follows:

1. At all times hereinafter mentioned, plaintiff ELIAS H. ATTEA, JR., DBA JR ATTEA WHOLESALE (hereinafter referred to as "Attea"), was and still is an individual lawfully conducting business as an Indian Trader under licenses issued by the United States Department of the Interior Bureau of Indian Affairs with a place of business in the State of New York at the address specified above.

2. Upon information and belief, defendant James W. Wetzler is the Commissioner of Taxation and Finance of the State of New York, and the head of defendant Department of Taxation and Finance of the State of New York (the "Department of Taxation and Finance").

3. Upon information and belief, defendant James W. Wetzler, as the Commissioner of Taxation and Finance is responsible pursuant to §170 and §171 of the Tax Law of the State of New York.

4. Upon information and belief, defendant Tax Appeals Tribunal of the State of New York (the "Tax Appeals Tribunal") is a body consisting of three commissioners responsible for the administration of the division of tax appeals pursuant to Article 40 of the New York Tax Law.

5. At all times hereinafter mentioned, plaintiff was and still is a wholesale dealer of cigarettes licensed under The United States Department of Interior Bureau of Indian Affairs, Title 25 Code of Federal Regulations Part 251 and was and still is engaged in, among other things, the wholesale distribution and sale of cigarettes to various Indian reservations in New York.

6. At all times pertinent, plaintiff Attea was and still is distributing and making wholesale sales of cigarettes to Indians on Indian reservations located within the territorial boundaries of the State of New York, which Indian reservations include, but are not limited to, the Allegany Indian Reservation, the Cattaraugus Indian Reservation, the Tonawanda Indian Reservation, the Tuscarora Indian Reservation, the Onondaga Indian Reservation and the Saint Regis Indian Reservation, which reservations are sovereign territories of sovereign American Indian Tribes.

7. Pursuant to New York Tax Law §471, a tax is imposed on all cigarettes possessed in the State by any person for sale, subject to certain exceptions, including the exception that "no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax...."

8. The State of New York does not have the power to impose or levy cigarette taxes pursuant to Article 20 of the New York Tax Law with respect to the aforesaid sales of cigarettes by plaintiff to Indians or Indian reservations nor does the State of New York have the power to regulate such business transactions conducted on Indian reservations, because, *inter alia*, pursuant to the United States Constitution, Article 1, section 8, clause 3, Congress has the sole power to regulate commerce with the Indian Tribes and the laws of the United States enacted pursuant thereto, in particular, the Indian Trader Statutes, 25 U.S.C. §§261 et seq., and regulations enacted thereunder which govern trade with Indians on Indian reservations, have pre-empted such state taxes, laws and regulations.

9. In addition, Indians on Indian reservations are immune from state taxation unless such state taxation is specifically authorized by the Congress of the United States.

10. The defendants have long recognized the tax immunity of Indians on Indian reservations, and the pre-emptive effect of federal law with respect to wholesale sales of cigarettes by plaintiff Attea to such Indians.

11. Notwithstanding the foregoing, and on or about August 29, 1987, defendant Department of Taxation and Finance of the State of New York adopted certain regulations which purport to apply New York's Tax Law to plaintiff's sales of cigarettes to Indians on Indian reservations and require the collection of New York cigarette taxes with respect to such sales as well as comprehensively regulate such sales. A copy of such regulations (hereinafter referred to as the "New Regulations") is annexed hereto as Exhibit "A".

12. The New Regulations, by their very terms, became effective on November 30, 1988; provided, however, that from such date of effectiveness to and including December 31, 1988, the New Regulations provide for a grace period when the defendants will register Indian Tribes and "registered dealers" as that term is defined in the New Regulations.

13. By reason of the foregoing, the New Regulations are in full force and effect and by their terms, purport to apply to transactions occuring on and after January 1, 1989. *See,* New Regulations, pages 17-18.

14. Pursuant to the New Regulaitons, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indians on Indian reservations in New York, except as to certain limited quantities approved by the defendant Department of Taxation and Finance or in some circumstances as agreed between defendant Department of Taxation and Finance and the Indian Tribe, subject to the other terms and limitations of such New Regulations. *See,* New Regulations pages 11-15, §§333.5(e); 335.5(b)(3), *et. seq.*

15. Furthermore, pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indian reservations in New York, unless such cigarettes are sold to certain Indians on such reservations who fulfill comprehensive requirements of defendant Department of Taxation and Finance, including registration with said defendant as a "Registered Dealer",

subject to the other terms and limitations of such New Regulations. *See,* New Regulations, pages 7-8, 11-12, §§335.4(e), 335l.5(b).

16. Furthermore, pursuant to the New Regulations, defendants seek to interpret and apply Article 20 of the New York Tax Law so as to impose the New York cigarette tax upon any and all cigarettes sold by wholesale distributors such as plaintiff Attea to Indian Tribes or nations in New York unless such Tribes or nations themselves obtain a valid exempt organization certificate issued by defendant Department of Taxation and Finance, and otherwise comply with the terms and limitations of such New Regulations. *See,* New Regulations, pages 5-6, §335.4(c).

17. Pursuant to the New Regulations, defendants also seek to impose upon wholesale distributors such as plaintiff Attea certain additional and special record keeping requirements with respect to sales to Indians on Indian reservations, including but not limited to receiving and retaining exemption certificates from Indian purchasers of untaxed cigarettes sold by plaintiff pursuant to the regulations, copies of invoices or other written evidence of such sales signed by the Indian purchasers taking delivery of such cigarettes, records of the Tribe's exempt organization number or the Registered Dealer's registration number, and other documents, all subject to the terms and limitations of such New Regulations. *See,* New Regulations, pages 6-7, §335.4(a).

18. Because Article 20 of the Tax Law, and in particular, Tax Law §471 thereof, expressly provides that "no tax shall be imposed on cigarettes sold under circumstances that this state is without power to impose such tax. . . ." the

aforesaid statute which imposes such cigarette taxes, by its own terms, does not apply to the sale and delivery of cigarettes made by plaintiff to Indians on Indian reservations as set forth above and, by reason of the foregoing, the New Regulations adopted by the defendant cannot be enforced with respect to sales made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York.

19. In addition to the foregoing, to the extent that Article 20 of the New York Tax Law may be applied by defendants to plaintiff's transactions with Indians on Indian reservations, and to the extent that any of the provisions of Article 20 of the New York Tax law do not, by their terms, expressly provide that same are not applicable to sales of the cigarettes made when "sold under such circumstances that this state is without power to impose such tax. . . ." said provisions are unconstitutional on their face or insofar as same are applied or may be applied pursuant to the New Regulations or otherwise to the sales of cigarettes made by plaintiff to Indians on Indian reservations and, by reason of the foregoing, said provisions and such application are preempted by federal law.

20. In addition to the foregoing, Indians on Indian reservations are immune from such State taxation and cannot be compelled, pursuant to the New Regulations or otherwise, to pay cigarette taxes to the plaintiff with respect to plaintiff's wholesale sales of cigarettes to Indians on Indian reservations.

21. Plaintiff's Indian customers are desirous of making wholesale purchases of cigarettes from the plaintiff but have refused to pay State taxes to the plaintiff with respect to

such purchases and have otherwise refused to be regulated by the defendant Department of Taxation and Finance with respect to such purchases.

22. By reason of the foregoing, there is presented for consideration and determination in this action the question of the power and jursidiction of the defendants to impose cigarette taxes upon plaintiff's wholesale sales of cigarettes to Indians on Indian reservations, and the question of the power and jurisdiction of the defendants to otherwise regulate such transactions.

23. A declaratory judgment with respect to the issue herein involved will settle directly, expeditiously and with finality the aforesaid controversy.

24. Plaintiff will suffer irreparable damage and is without an adequate remedy at law and is therefore entitled to a declaratory judgment of its rights regarding the application and legal effect of New York's Tax Law upon plaintiff in connection with the subject of this action, and is entitled to a preliminary and permanent injunction against the defendants in connection therewith, because of the foregoing reasons and for the following reasons:

(a) Plaintiff will unnecessarily be subjected to various administrative proceedings before defendant New York Tax Appeals Tribunal in order to contest any determinations hereinafter made by the defendants with respect to sales made by plaintiff to Indians on Indian reservations subsequent to the effective date of the New Regulations, which administrative proceedings will involve lengthy and costly hearings and which plaintiff believes will result in finding

by the said defendant confirming any assessments of cigarette taxes, interest and penalties against plaintiff with respect to any such sales;

(b) As a condition precedent to a court review of any such determinations by the defendant Tax Appeals Tribunal, plaintiff is required to either deposit with defendant Department of Taxation and Finance all taxes, interest and penalties which may be claimed due the defendants or to post a bond or undertaking for such amounts, including costs, which requirements will effectively preclude court review of this issue, since plaintiff does not have the financial ability to comply with such requirements;

(c) As a matter involving the applicability and/or constitutionality of the Tax Law and its application to plaintiff, plaintiff is entitled to have same determined by a court of competent jurisdiction; and

(d) Plaintiff Attea's sales to Indians on Indian reservations in New York constitute approximately 100% of plaintiff's total sales. Plaintiff Attea has incurred substantial expenses for equipment to service its Indian accounts, and plaintiff has not increased product lines to others in order to allow it to accommodate its Indian customers. In addition, plaintiff has lost substantial non-Indian customers as a result of negative publicity generated by defendants concerning plaintiff's sales to Indians on Indian reservations. Moreover, plaintiff has substantial accounts receivable due from Indian customers, in excess of $100,000. Since all or a substantial number of plaintiff's Indian customers refuse to pay New York State taxes with respect to their purchases on Indian reservations, defendants threatened application of the Tax Law to these transactions will result in a substantial loss

of business, the inability of plaintiff to collect its accounts receivable from Indians, and most likely will result in the total destruction of plaintiff's business.

25. By reason of the foregoing, plaintiff is entitled to a declaratory judgment:

(a) That the State of New York is without power to impose the aforesaid cigarette taxes with respect to any of the sales made or hereafter made by plaintiff to Indians on Indian reservations by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(b) That insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the New York Tax Law does not apply by its express terms to the sale of cigarettes by plaintiff to Indians on Indian reservations, and insofar as the Tax Law of the State of New York does not expressly so provide, and purports to impose the aforesaid cigarette taxes with respect to such sales, such provisions are unconstitutional;

(c) That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff to Indians on Indian reservations and, as a result thereof, is without power to enact or enforce the New Regulations insofar as plaintiff's wholesale sales to Indians on Indian reservations are concerned; and

(d) That any assessments of cigarette taxes against plaintiff by defendants which may be imposed under and pur-

suant to the New Regulations or otherwise with respect to plaintiff's wholesale sales of cigarettes to Indians on Indian reservations are unconstitutional, illegal, null and void and of no effect.

26. By reason of the foregoing, plaintiff is also entitled to a preliminary and permanent injunction restraining and enjoining the defendants, and each of them, or any of their respective agents, employees or other persons under their control:

(a) From determining, collecting or attempting to collect cigarette taxes with respect to the sales of cigarettes made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

(b) From commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of said sales;

(c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales; and

(d) From otherwise interfering, regulating or attempting to interfere or regulate any such sales.

WHEREFORE, plaintiff demands judgment against the defendants, and each of them, as follows:

(i) Judgment declaring:

(a) That the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(b) That, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or pre-empted by federal law; and

(c) That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York and, by reason thereof, the New Regulations, insofar as they purport to provide that such sales are subject to State taxes or regulation, are null and void and of no force and effect.

(ii) Judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, enjoining and restraining said defendants and persons preliminarily and permanently:

(a) From determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore

made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

(b) From commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of or in connection with said sales; and

(c) From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales.

(iii) Judgment for the costs and disbursements of this action; and

(iv) Judgment for such other and further relief as to the Court may seem just and proper.

Dated: Buffalo, New York
December 29, 1988

Williams, Stevens, McCarville &
Frizzell, P.C.
Timothy M. O'Mara of Council (sic)
Attorneys for Plaintiff
Office and P.O. Address
1920 Liberty Building
Buffalo, New York 14202
Tel: (716) 856-2112

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ERIE) SS:

ELIAS H. ATTEA, JR., being duly sworn, deposes and says that he is the Plaintiff in this action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ELIAS H. ATTEA, JR.

Subscribed and sworn to
before me this 29 day
of December, 1988

TIMOTHY M. O'MARA
Notary Public

TIMOTHY M. O'MARA
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1989

Order to Show Cause (Index No. 8-89).

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

[SAME TITLE]

Upon the summons and complaint herein, verified on the 29th day of December, 1988, and the affidavit of ELIAS H. ATTEA, JR., sworn to the 29th day of December, 1988, the respective exhibits annexed thereto, it is

ORDERED, that the defendants show cause before this court at Term, to be held at the Albany County Courthouse, Albany, New York, on the 9th day of January, 1989, why an order should not be entered herein, pursuant to CPLR 6311, granting plaintiff a preliminary injunction enjoining and restraining the defendants, and each of them, and their respective agents, employees or other persons acting under their direction or control: (a) from determining, collecting or attempting to collect cigarette taxes with respect to the sale of cigarettes made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of said sales; (c) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the regulations promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering, regulating or attempting to interfere or regulate any such sales; and it is further

ORDERED, that defendants, and each of them, show cause why an order should not be entered granting the

plaintiff such other and further relief as to this court may seem just and proper; and it is further

ORDERED, that service of a copy of this order, together with the papers annexed hereto on the defendants and the Attorney General of the State of New York before 30th day of December, 1988, shall be deemed sufficient service hereof.

Signed: 12-30-88
Albany, N.Y.

s/Edward S. Conway
Justice of the Supreme Court
Albany County

Letter Decision Hon. Paul E. Cheeseman (J.S.C.).

STATE OF NEW YORK
SUPREME COURT CHAMBERS
ALBANY COUNTY COURT HOUSE
ALBANY 12207

January 18, 1989

Kavinoky & Cook, Esqs.
Attorneys for Milhelm Attea & Sons
Joseph E. Zdarsky, of Counsel
120 Delaware Avenue
Buffalo, New York 14202

Williams, Stevens, McCarville
& Frizzell, P.C.
Attorneys for Elias H. Attea, Jr.
Timothy M. O'Mara of Counsel
1920 Liberty Building
Buffalo, New York 14202

Hon. Robert Abrams, Attorney General
of the State of New York
Attorneys for Defendant
Richard Freshour, Assistant Attorney
General, of Counsel
The Capitol
Albany, New York 12224

Re: Milhelm Attea & Bros., Inc.
-v- Department of Taxation & Finance of the State of N.Y. & JamesW. Wetzler, et al (FIRST ACTION)

and

Elias H. Attea, Jr. -v- James W. Wetzler, as Commissioner of Taxation & Finance of the State of N.Y., et al (SECOND ACTION)

Gentlemen:

Upon the question of issuance of a preliminary injunction, this Court is satisfied that the plaintiffs in both action have established at this stage of the proceeding, a reasonable likelihood of success (*Herzog Brothers Trucking v. New York State Tax Commission*, 69 NY2d 536; *Dougal v. County of Suffolk*, 87 AD2d 897) that there is no adequate remedy at law and that irreparable harm would be inflicted upon plaintiffs which could not be recovered should plaintiffs be successful (*Social Spirits, Inc. v. Town of Colonie*, 70 AD2d 1036).

Accordingly, plaintiff's motion for a preliminary injunction shall be granted. The injunction shall issue upon the condition that plaintiffs file an undertaking in the sum of $2,500.00. All papers to attorneys for plaintiffs who are to submit a single order in conformance herewith.

Very truly yours,

s/Paul E. Cheeseman
PAUL E. CHEESEMAN
J.S.C.

PEC:cb

Order Granting Preliminary Injunction.

At a Special Term of the
Supreme Court of the State
of New York held in and for
the County of Albany at the
Albany County Courthouse,
Albany, New York on the
17th day of January, 1989.

PRESENT: Hon. Paul E. Cheeseman, J.S.C.
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Plaintiff

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants.

(FIRST ACTION)
Index No. 7-89
RJI No. 0189017023
Justice Assigned:
Hon. Paul E. Cheeseman

and

ELIAS H. ATTEA, JR., 6175 Stickler Street,
Clarence, New York 14031

Plaintiff

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants

(SECOND ACTION)
Index No. 8-89
RJI No. 0189017022
Justice Assigned:
Hon. Paul E. Cheeseman

The plaintiffs in each of the above referenced actions having each made a motion for an order pursuant to CPLR §6311 granting a preliminary injunction enjoining and restraining the defendants, and each of them, and their respective agents, employees, or other persons acting under their direction or control; (a) from determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes made or hereafter made by the respective plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving the respective plaintiffs by reason of said sales; (c) from otherwise enforcing or attempting to enforce any other provisions

of the Tax Law of the State of New York or the regulations promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering with, regulating or attempting to interfere with or regulate any such sales; and said motions have regularly come on to be heard before the undersigned Justice of the Supreme Court and the undersigned Justice of the Supreme Court having heard a joint argument with respect to said motions,

NOW, THEREFORE, as to First Action referred to above, upon reading and filing the Order the Show Cause granted by the Honorable Edward S. Conway, J.S.C., on the 30th day of December, 1988, the summons and complaint verified on the 20th day of December, 1988, the affidavit of Rosemary Saffire, sworn to the 20th day of December, 1988, the affidavit of Eli Tarbell, sworn to the 19th day of December, 1988, the affidavit of Joseph E. Zdarsky, sworn to the 14th day of January, 1989 and the affidavit of Joseph Anderson, sworn to the 14th day of January, 1989 and the respective exhibits annexed thereto all in support of the motion of the plaintiff in the First Action and upon reading and filing the affidavits of Richard J. Freshour, Frank Munoz and William F. Collins, all sworn to on the 9th day of January, 1989, and the exhibits annexed thereto, all in opposition to the motion of the plaintiff in the First Action; and as to the Second Action referred to above, upon reading and filing the order to show cause granted by the Honorable Edward S. Conway, J.S.C. on the 30th day of December, 1988, the summons and complaint verified by the plaintiff in said action on the 29th day of December, 1988 in said action and the affidavit of Elias H. Attea, Jr., sworn to the 29th day of December, 1988 and the respective exhibits annexed thereto, all in support of the plaintiff's motion in said action, and upon reading and filing the affidavit of Richard J. Freshour, the affidavit of Frank Munoz and the

affidavit of William F. Collins, all sworn to the 9th day of January, 1989 and the respective exhibits annexed thereto in opposition to said motion and after hearing Kavinoky & Cook, Joseph E. Zdarsky, Esq., of counsel, attorneys for Milhelm Attea & Bros., Inc., the plaintiff in the First Action referred to above in support of the motion of the plaintiff in said action and Williams, Stevens, McCarville & Frizzell, P.C., Timothy M. O'Mara, Esq., of counsel, attorneys for Elias H. Attea, Jr., the plaintiff in the Second Action referred to above in support of the motion of the plaintiff in said action and the Honorable Robert Abrams, Attorney General of the State of New York, Richard J. Freshour, Esq., Assistant Attorney General, of counsel, attorneys for the defendants in each of the said actions in opposition to the said motions; and due deliberation having been had thereon, and the Court having rendered its written decision dated January 18, 1989; it is

ORDERED that the respective motions of Milhelm Attea & Bros., Inc., the plaintiff in the First Action above, and Elias H. Attea, Jr., the plaintiff in the Second Action above, for preliminary injunctions, be and the same hereby are granted as hereinafter set forth; and it is further

ORDERED that the undertaking for Milhelm Attea & Bros., Inc. the plaintiff in the First Action is hereby fixed in the sum of $2,500 and the preliminary injunction in its favor as hereinafter set forth shall issue upon the condition that said plaintiff file an undertaking in the sum of $2,500 and that the undertaking for Elias H. Attea, Jr. the plaintiff in the Second Action is hereby fixed in the sum of $2,500 and the preliminary injunction in his favor as hereinafter set forth shall issue upon the condition that said plaintiff file an undertaking in the sum of $2,500; and it is further

ORDERED that during the pendency of the First Action referred to above, the defendants therein and each of them,

and their respective agents, employees or other persons acting under their direction and control are hereby enjoined and restrained (a) from determining, collecting or attempting to collect any cigarette taxes with respect to the sales of cigarettes made or hereafter made by Milhelm Attea & Bros., Inc., the plaintiff in said action, to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving Milhelm Attea & Bros., Inc., the plaintiff in the said action by reason of the said sales; (c) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the regulations promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering with, regulating or attempting to interfere with or regulate any such sales; and it is further

ORDERED that during the pendency of the Second Action referred to above, the defendants therein and each of them, and their respective agents, employees or other persons acting under their direction and control are hereby enjoined and restrained (a) from determining, collecting or attempting to collect any cigarette taxes with respect to the sales of cigarettes made or hereafter made by Elias H. Attea, Jr., the plaintiff in said action, to Indians on Indian reservations within the territorial boundaries of the State of New York; (b) from commencing or causing to be commenced or maintaining under the Tax Law or otherwise administrative proceedings, civil proceedings or criminal proceedings against or involving Elias H. Attea, Jr., the plaintiff in the said action by reason of the said sales; (c) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the regulations

promulgated thereunder by reason of or in connection with such sales; and (d) from otherwise interfering with, regulating or attempting to interfere with or regulate any such sales.

Dated: Albany, New York
January 19, 1989

ENTER.

s/Paul E. Cheesemen
PAUL E. CHEESEMAN
Honorable Paul E. Cheeseman
Justice of the Supreme Court

0540OK

s/Thomas G. Clingan, EB
1-19-89

Verified Answer (Index No. 7-89).

STATE OF NEW YORK SUPREME COURT

COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC. 1509 Clinton Street, Buffalo, New York 14206,

Plaintiffs,

against

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

Index No. 7-89

RJI No. 0189 017023
Assigned Justice: Cheeseman

Defendants, by their attorney, Robert Abrams, Attorney General of the State of New York, as and for their verified

answer and defenses to the complaint herein, respectfully allege as follows:

FIRST: Admit the allegations contained in paragraphs 2, 3, 12 and 13 thereof.

SECOND: Deny the allegations contained in paragraphs 8, 18, 19, 25 and 26 thereof.

THIRD: Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 1, 6 and 21 thereof.

FOURTH: Admit the allegations contained in paragraph 4, but deny that the defendant Tax Appeals Tribunal of the State of New York is a proper party to this proceeding.

FIFTH: With respect to the allegations contained in paragraph 5, deny knowledge or information sufficient to form a belief as to whether or not the plaintiff "was and still is engaged in . . . the wholesale distribution and sale of cigarettes in New York."

SIXTH: With respect to the allegations contained in paragraph 7, affirmatively allege that New York Tax Law §471 is the best evidence of its contents and speaks for itself.

SEVENTH: With respect to the allegations contained in paragraphs 9, 20 and 23, affirmatively allege that those paragraphs set forth conclusions of law which the defendants are neither required to admit nor deny.

EIGHTH: Deny the allegations contained in paragraph 10 and further affirmatively allege that those allegations are irrelevant to the matters raised in the instant complaint inasmuch as those allegations refer to a period prior to the effective date of the regulations which are being challenged.

NINTH: With respect to the allegations contained in paragraphs 11, admit that the regulations annexed as Exhibit A to the complaint were adopted, but deny the remaining allegations contained in that paragraph.

TENTH: With respect to the allegations contained in paragraph 14, deny that the taxing scheme complained of herein imposes taxes upon wholesale distributors and affirmatively allege that any taxes which are being imposed have their legal incidence fall upon the ultimate non-Indian consumer (see Tax Law §471[2]) and further deny that the volume of exempt cigarettes is limited as to quantity.

ELEVENTH: Deny so much of the allegations contained in paragraph 15 as asserts that taxes are being imposed on wholesale distributors and affirmatively allege that any tax which is imposed has its legal incidence fall on the ultimate non-Indian consumer (see Tax Law §471[2]) and admit that the defendants are regulating the Indians.

TWELFTH: Deny so much of the allegations contained in paragraph 16 as asserts that taxes are being imposed on wholesale distributors and affirmatively allege that any tax which is imposed has its legal incidence fall on the ultimate non-Indian consumer (see Tax Law §471[2]) and admit that the defendants are regulating the Indians.

THIRTEENTH: Deny the allegations contained in paragraph 17 and affirmatively allege that the New Regulations referred to therein are the best evidence of their contents and speak for themselves.

FOURTEENTH: Deny the allegations contained in paragraph 22 inasmuch as no cigarette taxes are being imposed upon the plaintiff or other similarly situated entities like the plaintiff.

FIFTEENTH: Deny the allegations contained in paragraph 24, except as to the allegations contained in subparagraph (d), and deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in that subparagraph.

AS AND FOR A FIRST DEFENSE
TO THE COMPLAINT HEREIN
DEFENDANTS RESPECTFULLY ALLEGE:

SIXTEENTH: The Tax Appeals Tribunal is not a proper party to this proceeding inasmuch as the plaintiff sets forth no claims of wrongdoing on the part of that body.

AS AND FOR A SECOND DEFENSE
TO THE COMPLAINT HEREIN
DEFENDANTS RESPECTFULLY ALLEGE:

SEVENTEENTH: This matter is not ripe for adjudication.

AS AND FOR A THIRD DEFENSE
TO THE COMPLAINT HEREIN
DEFENDANTS RESPECTFULLY ALLEGE:

EIGHTEENTH: The plaintiff lacks standing.

AS AND FOR A FOURTH DEFENSE
TO THE COMPLAINT HEREIN
DEFENDANTS RESPECTFULLY ALLEGE:

NINETEENTH: These regulations do not impermissibly impact on Indian traders so as to be declared constitutionally infirm.

WHEREFORE, it is respectfully requested that the complaint be dismissed and the relief sought therein denied in all respects and the subject regulations be upheld in all respects.

Dated: Albany, New York
January 20, 1989

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
The Capitol
Albany, New York 12227
(RICHARD J. FRESHOUR, Assistant
Attorney General, of Counsel)
Telephone: (518) 473-3684

TO: KAVINOKY & COOK
Attorneys for Plaintiffs
120 Delaware Avenue
Buffalo, New York 14202

STATE OF NEW YORK)
) s.s.:
COUNTY OF ALBANY)

TERRENCE M. BOYLE, being duly sworn, deposes and says:

I am an attorney employed by the New York State Department of Taxation and Finance and the Director of the New York State Department of Taxation and Finance Law Bureau. I have read the foregoing answer and know the contents thereof and the same is true to my knowledge except as to those matters thereon stated on information and belief and as to those matters I believe them to be true. This verification is made by me pursuant to CPLR 3020(d) (2). The reason why this verification is made by me is that the primary respondent in interest is the Commissioner of the New York Department of Taxation and Finance. The sources of my information and the grounds for my belief as to those matters not stated upon my knowledge are statements and reports of officers and employees of the respondent Commissioner of the Department of Taxation and Finance and documents and correspondence in my possession.

TERRENCE M. BOYLE

Sworn to before me this
20th day of January, 1989

GEORGE BLASSMAN
NOTARY PUBLIC

GEORGE BLASSMAN
Notary Public 02BL4761759
Albany County
Commission Expires 11/30/90

Verified Answer (Index No. 8-89)

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, NY 14031,

Plaintiffs,

against

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

Index No. 8-89
RJI No. 0189 017022
Assigned Justice:
Cheeseman

Defendants, by their attorney, Robert Abrams, Attorney General of the State of New York, as and for their verified answer and defenses to the complaint herein, respectfully allege as follows:

FIRST: Admit the allegations contained in paragraphs 2, 3, 12 and 13 thereof.

SECOND: Deny the allegations contained in paragraphs 8, 10, 11, 18, 19, 22, 25 and 26 thereof.

THIRD: Deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 1, 5, 6 and 21 thereof.

FOURTH: Admit the allegations contained in paragraph 4, but deny that the defendant Tax Appeals Tribunal of the State of New York is a proper party to this proceeding.

FIFTH: With respect to the allegations contained in paragraph 7, affirmatively allege that New York Tax Law §471 is the best evidence of its contents and speaks for itself.

SIXTH: With respect to the allegations contained in paragraphs 9, 20, and 23, affirmatively allege that those paragraphs set forth conclusions of law which the defendants are neither required to admit nor deny.

SEVENTH: With respect to the allegations contained in paragraph 14, deny that the taxing scheme complained of herein imposes taxes upon wholesale distributors and affirmatively allege that any taxes which are being imposed have their legal incidence fall upon the ultimate non-Indian consumer (see Tax Law §471[2]) and further deny that the volume of exempt cigarettes is limited as to quantity.

EIGHTH: Deny so much of the allegations contained in paragraph 15 as asserts that taxes are being imposed on wholesale distributors and affirmatively allege that any tax

which is imposed has its legal incidence fall upon the ultimate non-Indian consumer (see Tax Law §471[2]) and admit that the defendants are regulating the Indians.

NINTH: Deny so much of the allegations contained in paragraph 16 as asserts that taxes are being imposed on wholesale distributors and affirmatively allege that any tax which is imposed has its legal incidence fall upon the ultimate non-Indian consumer (see Tax Law §471[2]) and admit that the defendants are regulating the Indians.

TENTH: Deny the allegations contained in paragraph 17 and affirmatively allege that the New Regulations referred to therein are the best evidence of their contents and speak for themselves.

ELEVENTH: Deny the allegations contained in paragraph 24, except as to the allegations contained in subparagraph (d), and deny knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in that subparagraph.

AS AND FOR A FIRST DEFENSE TO THE COMPLAINT HEREIN DEFENDANTS RESPECTFULLY ALLEGE:

TWELFTH: The Tax Appeals Tribunal is not a proper party to this proceeding inasmuch as the plaintiff sets forth no claims of wrongdoing on the part of that body.

AS AND FOR A SECOND DEFENSE TO THE COMPLAINT HEREIN DEFENDANTS RESPECTFULLY ALLEGE:

THIRTEENTH: This matter is not ripe for adjudication.

AS AND FOR A THIRD DEFENSE TO THE COMPLAINT HEREIN DEFENDANTS RESPECTFULLY ALLEGE:

FOURTEENTH: The plaintiff lacks standing.

AS AND FOR A FOURTH DEFENSE TO THE COMPLAINT HEREIN DEFENDANTS RESPECTFULLY ALLEGE:

FIFTEENTH: These regulations do not impermissibly impact on Indian traders so as to be declared constitutionally infirm.

WHEREFORE, it is respectfully requested that the complaint be dismissed and the relief sought therein denied in all respects and the subject regulations be upheld in all respects.

Dated: Albany, New York
January 20, 1989

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
The Capitol
Albany, New York 12227
(RICHARD J. FRESHOUR, Assistant
Attorney General, of Counsel)
Telephone: (518) 473-3684

TO: TIMOTHY M. O'MARA, ESQ.
WILLIAMS, STEVENS, McCARVILLE
& FRIZZELL, P.C.
Attorneys for Plaintiffs
1920 Liberty Building
Buffalo, New York 14202

STATE OF NEW YORK)
) s.s.:
COUNTY OF ALBANY)

TERRENCE M. BOYLE, being duly sworn, deposes and says:

I am an attorney employed by the New York State Department of Taxation and Finance and the Director of the New York State Department of Taxation and Finance Law Bureau. I have read the foregoing answer and know the contents thereof and the same is true to my knowledge except as to those matters thereon stated on information and belief and as to those matters I believe them to be true. This verification is made by me pursuant to CPLR 3020(d)(2). The reason why this verification is made by me is that the primary respondent in interest is the Commissioner of the New York State Department of Taxation and Finance. The sources of my information and the grounds for my belief as to those matters not stated upon my knowledge are statements and reports of officers and employees of the respondent Commissioner of the Department of Taxation and Finance and documents and correspondence in my possession.

/s/Terrence M. Boyle
TERRENCE M. BOYLE

Sworn to before me this
20th day of January, 1989

/s/George Blassman
NOTARY PUBLIC

GEORGE BLASSMAN
Notary Public 02BL4761759
Albany County
Commission Expires 11/30/90

Notice of Motion for Summary Judgment (Index No. 7-89).

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHELM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206

Plaintiff,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227

Defendants.

Index No. 7-89

RJI No. 0189017023

Justice: Hon. Paul E. Cheeseman

ORAL ARGUMENT REQUESTED

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Rosemay Saffire, sworn to the 31st day of March, 1989 and the exhibits annexed thereto and upon the summons and complaint herein and all prior pleadings and proceedings in this action, plaintiff will move this court at a special term thereof, at the Albany County Courthouse, Albany, New York on the 17th day of April, 1989, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for summary judgment pursuant to CPLR 3212 on the grounds that there no issues of fact and that plaintiff is entitled to summary judgment as a matter of law for the relief demanded in plaintiff's complaint as follows:

A. Judgment declaring:

1. That the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

2. That, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and

purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or pre-empted by federal law; and

3. That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York and, by reason thereof, the New Regulations, insofar as they purport to provide that such sales are subject to State taxes or regulation, are null and void and of no force and effect.

B. Judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, permanently enjoining and restraining said defendants and persons:

1. From determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

2. From commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of or in connection with said sales; and

3. From otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales.

C. Judgment for the costs and disbursements of this action and

D. Judgment for such other and further relief as to the court may seem just and proper.

This is an action for declaratory judgment and a permanent injunction.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR §2214(b) answering affidavits, if any, shall be served at least seven (7) days prior to the return date of this motion.

PLEASE TAKE FURTHER NOTICE, that the plaintiff hereby demands oral argument with respect to this motion.

Dated: Buffalo, New York
March 31, 1989

Yours, etc.,

KAVINOKY & COOK
Attorneys for Plaintiff
120 Delaware Avenue
Buffalo, New York 14202
(716) 845-6000

To: The Hon. Robert Abrams
Attorney General of the
State of New York
(Attn: Richard Freshour, Esq.)
The Capitol
Albany, NY 12224

Notice of Motion for Summary Judgment (Index No. 8-89) dated April 24, 1989.

STATE OF NEW YORK

SUPREME COURT : COUNTY OF ALBANY

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031

Plaintiff,

vs.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION & FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK State Campus, Albany, New York 12227

Defendant.

Index Number: 8-89
RJI Number: 0189017022
Assigned Justice: Paul E. Cheeseman

ORAL ARGUMENT REQUESTED

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ELIAS H. ATTEA, JR., sworn to the 24th day of April, 1989, and the exhibits annexed thereto and upon the summons and complaint herein and all prior pleadings and proceedings in this action, plaintiff will move this court at a

special term thereof, at the Albany County Courthouse, Albany, New York, on the 15th day of May, 1989, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard for summary judgment pursuant to CPLR 3212 on the grounds that there are no issues of fact and that plaintiff is entitled to summary judgment as a matter of law for the relief demand in plaintiff's complaint as follows:

A. Judgment declaring:

1. That the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

2. That, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or pre-empted by federal law; and

3. That the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff to Indians on Indian reservations within the terri-

torial boundaries of the State of New York and, by reason thereof, the New Regulations, insofar as they purport to provide that such sales are subject to State taxes or regulations, are null and void and of no force and effect.

B. Judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, permanently enjoining and restraining said defendants and persons:

1. From determining, collecting or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff to Indians on Indian reservations within the territorial boundaries of the State of New York;

2. From commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff by reason of or in connection with said sales; and

3. From otherwise enforceing or attempting to enforce any other provisions of the Tax Law of the State of New York or the New Regulations by reason of or in connection with such sales.

C. Judgment for the costs and disbursements of this action and

D. Judgment for such other and further relief as to the Court may deem just and proper.

This is an action for declaratory judgment and a permanent injunction.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR §2214(b) answering affidavits, if any, shall be served at least seven (7) days prior to the return date of this motion.

PLEASE TAKE FURTHER NOTICE, that the plaintiff hereby demands oral argument with respect to this motion.

Dated: Buffalo, New York
April 24, 1989

Yours, etc.,

WILIAMS, STEVENS, MCCARVILLE
& FRIZZELL, P.C.
ATTORNEYS FOR PLAINTIFF
1920 LIBERTY BUILDING
BUFFALO, NEW YORK 14202
(716) 856-2112

TO: Robert Abrams, Attorney General
of the State of New York
Richard J. Freshour, Esq.
Assistant Attorney General
Attorney for Defendants
The Capitol
Albany, New York 12224

Notice of Cross-Motion for Summary Judgment.

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC.

Plaintiff,

-against-

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

Index No. 7-89
RJI No. 0189 017023
Assigned Justice: Cheeseman
ORAL ARGUMENT IS REQUESTED

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Jamie Woodward, sworn to the 18th day of May, 1989, and William F. Collins, sworn to the 19th day of May, 1989, submitted in opposition to plaintiff's motion for summary judgment and in support of this cross-motion for summary judgment, and upon all the prior pleadings and proceedings had in this action, defendants will move this Court at an individual assignment term thereof to be held at the Albany County Courthouse, in the City of Albany, New York on the 30th day of May, 1989, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for judgment denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment, pursuant to CPLR 2215 and 3212 on the grounds that there are no issues of fact and that defendants are entitled to summary judgment as a matter of law declaring that the regulations of defendants under attack herein are lawful in all respects and should be upheld in all respects.

Dated: Albany, New York
May 19, 1989

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
The Capitol
Albany, New York 12224
(RICHARD J. FRESHOUR, Assistant
Attorney General, of Counsel)
Telephone: (518) 473-3684

TO: JOSEPH ZDARSKY, ESQ.
Kavinoky & Cook
120 Delaware Avenue
Buffalo, NY 14202

Notice of Cross-Motion for Summary Judgment (Index No. 8-89) dated May 19, 1989.

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031

Plaintiff,

-against-

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION & FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

Index No. 8-89
RJI No. 0189 017022
Assigned Justice: Cheeseman
ORAL ARGUMENT IS REQUESTED

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Jamie Woodward, sworn to the 18th day of May, 1989, and William F. Collins, sworn to the 19th day of May, 1989, submitted in opposition to plaintiff's motion for summary judgment and in support of this cross-motion for summary judgment, and upon all the prior pleadings and proceedings had in this action, defendants will move this Court at an individual assignment term thereof to be held at the Albany County Courthouse, in the city of Albany, New York on the 30th day of May, 1989, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for judgment denying plaintiff's motion for summary judgment and granting defendants' cross-motion for summary judgment, pursuant to CPLR 2215 and 3212 on the grounds that there are no issues of fact and that defendants are entitled to summary judgment as a matter of law declaring that the regulations of defendants under attack herein are lawful in all respects and should be upheld in all respects.

Dated: Albany, New York
May 19, 1989

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
The Capitol
Albany, New York 12224
(RICHARD J. FRESHOUR, Assistant
Attorney General, of Counsel)
Telephone: (518) 473-3684

TO: TIMOTHY M. O'MARA, ESQ.
Williams, Stevens, McCarville
& Frizzell, P.C.
1920 Liberty Building
Buffalo, NY 14202